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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MISSOURI,
Petitioner,

v.

WILLIAM McKINNEY, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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I

QUESTIONS PRESENTED

Whether the imposition of multiple convictions and sentences at a single trial for both armed criminal action (defined by § 571.015, RSMo 1978, as the commission of a felony "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon"), and the underlying or predicate felony, for conduct arising from the same transaction, violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, insofar as it bars "multiple punishments for the same offense", where such multiple convictions and sentences are expressly authorized by statute.

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No. _____

IN THE

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OCTOBER TERM, 1982

STATE OF MISSOURI,
Petitioner,

v.

WILLIAM McKINNEY, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

The petitioner, State of Missouri, respectfully requests that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Western District, in the case styled State of Missouri vs. William McKinney, Jr., No. 31,553.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, reversing the respondent's conviction for armed criminal action on federal double jeopardy grounds was issued on March 23, 1982, and is presently reported at 633 S.W.2d 164. It also has been reprinted in its entirety in Appendix A, *infra*, of this petition.

JURISDICTIONAL STATEMENT

On March 23, 1982, the Missouri Court of Appeals, in the case styled State of Missouri v. William McKinney, Jr., No. WD 31, 553, reversed the respondent's conviction for armed criminal action, § 571.015, RSMo 1978, on the ground that convictions for both armed criminal action and the underlying felony (in this case, robbery in the second degree, § 569.030, RSMo 1978), "constitute[d] a violation of his constitutional right against double jeopardy." *State* v. *McKinney*, 633 S.W.2d 164, 165-166[3] (Mo.App., W.D. 1982). The respondent's alternative motion for rehearing or transfer to the Missouri Supreme Court was overruled on May 4, 1982, and the opinion became final on June 14, 1982, when the Missouri Supreme Court denied the State's timely application to transfer. *State* v. *McKinney, supra*, 633 S.W.2d at 164.

This petition has been filed within 60 days after the entry of final judgment in this case as required by 28 U.S.C. § 2101(d) and Rule 20.1 or this Court, and this Court's jurisdiction is invoked under U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *

STATUTES INVOLVED

Sections § 556.041, 556.046, § 569.030 and 571.015, RSMo 1978, § 559.225, RSMo Supp. 1976, and § 571.017, RSMo Supp. 1982, are set out in Appendix B. Sections 750.227(b) and 750.529, M.C.L.A., are set out in Appendix C.

STATEMENT OF THE CASE

This petition involves the same issue upon which this Court recently granted certiorari in *Missouri* v. *Danny Hunter*, No. 81-1214 (U.S. April 5, 1982), granting certiorari in *State* v. *Hunter*, 622 S.W.2d 374 (Mo.App., W.D. 1981). In this case, as in *Hunter*, the respondent's conviction and sentence for armed criminal action, § 571.015, RSMo 1978,[1] was vacated on the ground that convictions for both armed criminal action and the predicate felony, imposed in the same trial and arising out of the same criminal transaction, violated the Fifth Amendment's prohibition against double jeopardy.

The facts of this case, for purposes of the double jeopardy clause, are substantially the same as in *Hunter*, inasmuch as the respondent in this case was charged and convicted, in a single trial, of both armed criminal action, § 571.015, and the underlying felony, in this case, robbery in the second degree, § 569.030, RSMo 1978.

As previously indicated, the issue presented by this petition is identical to the issue which will be considered by this Court this fall in *Missouri* v. *Hunter*, *supra*, and also is identical to the issues presented by the certiorari petitions filed by the State of Missouri in *Missouri* v. *Kane*, No. 81-2117 (petition for certiorari filed May 7, 1982); *Missouri* v. *Haggard*, No. 81-625 (petition for certiorari filed Sept. 24, 1981); and *Wyrick* v. *Williams*, No. 80-2200 (petition for certiorari filed June 29, 1981).

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[1] In *Hunter*, as well as most of the previous cases that are or have been before this Court involving Missouri's armed criminal action statute, the defendants were convicted of armed criminal action under § 559.225, RSMo Supp. 1976, which statute was repealed and re-enacted as § 571.015, effective January 1, 1978. As re-enacted, § 571.015 is a verbatim rescript of § 559.225 with only two minor exceptions, neither of which is relevant to the issues presented by this petition.

REASONS FOR GRANTING THE WRIT

The petitioner submits that a writ of certiorari should issue in this case because the holding of the Missouri Court of Appeals, Western District, and the decisions of the Missouri Supreme Court on which it was based, is in direct and irreconcilable conflict with recent decisions of this Court, particularly *Albernaz* v. *United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), and *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 LEd.2d 715 (1980).

In this case, the respondent contended on direct appeal "that his conviction for armed criminal action [wa]s invalid as in violation of his rights against double jeopardy". *State* v. *McKinney*, 633 S.W.2d 164, 165 (Mo.App., W.D. 1982). In response, the Missouri Court of Appeals stated:

> "Where a defendant is convicted of second-dgree robbery, his conviction for armed criminal action, growing out of the same incident, constitutes a violation of his constitutional right against double jeopardy. In such a case the armed criminal action conviction must be set aside. *State* v. *Kane*, 629 S.W.2d 370 (Mo.App. 1981); *State* v. *Kane*, 629 S.W.2d 372 (Mo. banc 1982); *State* v. *Thompson*, Mo.App., 629 S.W.2d 361 (1981); *State* v. *Thompson*, 629 S.W.2d 369 (Mo. banc 1982)."

State v. *McKinney*, *supra*, 633 S.W.2d at 165-166.

In accordance with this ruling, the Court of Appeals affirmed the respondent's conviction and 11-year sentence for robbery in the second degree, but reversed on double-jeopardy grounds his conviction and concurrent 24-year sentence for armed criminal action. *State* v. *McKinney*, *supra*, 633 S.W.2d at 166.

A. Nonexistence of Independent State Ground

As demonstrated by even a cursory analysis of the opinion by the Court of Appeals in this case, the respondent's conviction for armed criminal action was based *solely* on federal double jeopardy grounds. However, in a virtually identical situation, counsel for the respondents in *Missouri* v. *Kane*, No. 81-2117 (petition for certiorari filed May 7, 1982), rather disingenuously argued that there existed an independent state ground for the reversal of the respondents' convictions and sentences for armed criminal action, separate and apart from the Missouri Supreme Court's interpretation and application of the Fifth Amendment.

This argument stems from *dicta* that appears in *State ex rel. Westfall* v. *Ruddy*, 621 S.W.2d 42 (Mo. banc 1981), a case which specifically involved the question of whether the State could *charge* a defendant with both armed criminal action under § 571.015 and the underlying felony. The court reaffirmed its early rulings that convictions for both armed criminal action and the predicate felony violated the double jeopardy clause, *id.*, 621 S.W.2d at 44, and ultimately concluded that "the armed criminal action statute remains a viable part of our criminal law and is available to punish more severely those who use weapons to commit felonies". *Id.* Accordingly, the Court ruled that the State was not precluded from charging and trying the defendant for both armed criminal action and the underlying felony, but that the charges should be submitted in the alternative with directions to the jury that it could only convict of one offense. *Id.*, 621 S.W.2d at 45.

However, in the course of the opinion, the Court made reference to § 556.041, RSMo 1978, which generally precludes a conviction for more than one offense if the second

"offense is included in the other", § 556.041.(1), and later stated that, although the defendant could be charged with, and tried for, both offenses, "the jury may convict of only one of them pursuant to § 556.041.(1)." *Id.*, 621 S.W.2d at 45. In a dissenting opinion written by Donnelly, J., and concurred in by Rendlen, J., Judge Donnelly correctly characterized the above-quoted language as "dicta" and stated that he believed that the reversal of the Missouri Supreme Court's double-jeopardy rationale expressed in previous armed criminal action cases was "a certainty." He then added: "In light of such contingency, the volunteered references in the principal opinion to § 556.041, RSMo 1978, are extremely unfortunate." *Id.*, 621 S.W.2d at 46-47 (Donnelly, J., dissenting).

It is now clear that the "unfortunate" *dicta* in *Ruddy* concerning the effect of § 556.041 represents only the views of its author, Judge Bardgett, and not the majority of the Missouri Supreme Court. For in all of the cases decided by the court involving the validity of multiple punishments for both armed criminal action under § 571.015, RSMo 1978, and the underlying felony, the Missouri Supreme Court has consistently eschewed reliance on *Ruddy* and has decided the issue in every case on the basis of the Fifth Amendment.

For example, in *State* v. *Kane*, 629 S.W.2d 372 (Mo. banc 1981), the court, in setting aside the defendant's conviction and sentence for armed criminal action under § 571.015, relied on its earlier cases interpreting the multiple punishment provisions of § 559.225, RSMo Supp. 1976, *State* v. *Kane, supra*, 629 S.W.2d at 377, and adhered to those rulings in declaring that § 571.015's "attempt to enhance or enlarge" the punishment for the underlying offense was ineffectual, "because of being phrased in terms of separate crime or offense *and in our opinion there-*

by violative of the constitutional prohibition against double jeopardy." (emphasis added.) *Id.*, 629 S.W.2d at 377. Significantly, the majority did not even mention *Ruddy* or § 556.041.

In *State* v. *Thompson*, 629 S.W.2d 369, 370 (Mo. banc 1982), decided on the same day as *Kane*, the court set aside the defendant's conviction for armed criminal action under § 571.015 on the authority of *Kane*, and adopted the original opinion of the Court of Appeals "subject to this opinion." The Court of Appeals had vacated the defendant's conviction for armed criminal action because "convictions for both armed criminal action and the underlying felony infringes the prohibition against double jeopardy." *State* v. *Thompson*, 629 S.W.2d 361, 369[13] (Mo.App., W.D. 1981).

In *State* v. *Arnold*, 628 S.W.2d 665, 667 (Mo. 1982), Division No. 2 of the Missouri Supreme Court ruled that convictions for both armed criminal action under § 571.015 and the underlying felony "constituted double jeopardy and should be reversed."[2]

Most recently, in *State* v. *Upshaw*, ___ S.W.2d ___, Nos. 63,326 and 63,048 (Mo. June 8, 1982), at 4, slip opinion, Division No. 2 of the Missouri Supreme Court invalidated a defendant's conviction for armed criminal action under § 571.015. Unlike prior cases, the court cited *Ruddy*—but only for the proposition that the State could alternatively charge a defendant with both armed criminal action and the underlying felony. Although the court in *Upshaw* went on to say that "the jury may convict the defendant of only one of the charges", the court cited *Sours* v. *State*,

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[2]A consolidated petition for writ of certiorari involving the decisions in *Kane*, *Thompson* and *Arnold* is presently pending before this Court in *Missouri* v. *Kane*, No. 81-2117 (petition for certiorari filed May 7, 1982).

603 S.W.2d 592 (Mo. banc 1980) to support this proposition, not § 556.041. *State* v. *Upshaw, supra,* at 4, slip opinion. Then, in reversing the appellant's conviction for armed criminal action, the court relied on its decisions in *Thompson, Kane,* and *State* v. *Haggard,* 619 S.W.2d 44 (Mo. banc 1981), all of which resolved the multiple punishment question on the basis of the Double Jeopardy Clause. *Id.,* at 4, slip opinion.

Thus, the Missouri Supreme Court has *never* relied on either *Ruddy* or § 556.041 to invalidate a defendant's conviction for armed criminal action,[3] but continues to adhere to its erroneous conclusion that punishments for both armed criminal action under § 571.015 and the underlying felony are prohibited by the Fifth Amendment, regardless of legislative intent. And, in the case presented by this petition, the Court of Appeals relied on prior state cases interpreting the Fifth Amendment—not Ruddy or § 556.041—in concluding that punishment for both armed criminal action and second-degree robbery "constitutes a violation of his constitutional right against double jeopardy." *State* v. *McKinney, supra,* 633 S.W.2d at 165.

Consequently, any attempt by the respondent to rely on the unfortunate (and now discredited) *dicta* of *Ruddy* to argue that there exists some independent state basis

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[3]Obviously concerned that the Missouri Supreme Court might use the *dicta* in *Ruddy* to ignore the specific directive in § 571.015.1 that "[t]he punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law" for the underlying felony, the legislature passed § 571.017, RSMo Supp. 1982, which provides that "[n]othing contained in any other provision of law" apart from § 571.015 "shall prevent imposition of sentences for both armed criminal action and the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon." However, since the Missouri Supreme Court has not attempted to use the general language of § 556.041.1(1) to negate the specific multiple-punishment directive of § 571.015.1, this amendment appears to have been unnecessary.

for the result reached in this case, independent of the Fifth Amendment, would constitute nothing more than an acknowledgement that his position on the constitutional issue—the only issue considered by the Court of Appeals—is utterly hopeless. Indeed, in his response to the State's petition for writ of certiorari in *Kane*, counsel for the respondents simply ignored the constitutional issues, and devoted his entire argument to attempting to convince this Court not to grant the petition because of the possibility that there might exist some independent state ground to justify the reversal of the armed criminal action convictions.

However, as previously demonstrated, no such independent state ground exists, either in the cases joined by the *Kane* petition or in this case. There is, therefore, no basis for denying certiorari in this case, or for remanding the case (as the respondents suggested in *Kane*) to the Missouri Court of Appeals to determine the possible existence of some phantom "independent state ground". No such ground exists.

B. Invalidity of Constitutional Holding

The issue presented by this petition is not unfamiliar to this Court. In fact, as previously emphasized, the precise constitutional question presented by this case will be argued before this Court this fall in *State of Missouri* v. *Hunter*, No. 81-1214 (petition for certiorari granted April 5, 1982). The ruling in that case will be dispositive of the issue raised in this petition, and since the State's position relative to the issues presented in that case are briefed at length in both the petition and the brief that was recently filed by the State in *Hunter* those arguments will be only briefly summarized herein.

Essentially, the question presented by this case (and by *Hunter*) is whether the imposition of legislatively authorized multiple convictions and sentences at a single trial for both armed criminal action (defined by § 571.015, RSMo 1978, as the commission of a felony "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon") and the underlying felony, for conduct arising from the same transaction, violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, insofar as it bars "multiple punishments for the same offense".

Unlike the majority of state and federal statutes, which are generally silent as to whether the legislature or Congress has authorized multiple punishments for conduct which violates more than one statute, § 571.015 provides that the punishment provided by this statute "shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon."

In *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980) (*Sours I*), the Missouri Supreme Court overruled its earlier decisions to the contrary and held that, notwithstanding the legislature's unmistakable intent to impose cumulative punishments, a defendant could not be convicted of both armed criminal action and the predicate felony without offending the Double Jeopardy Clause of the Fifth Amendment. The court concluded that the Double Jeopardy Clause precluded conviction for both a greater offense and a lesser-included offense, even in a single trial and even where authorized by the legislature. *Sours* v. *State*, *supra*, 593 S.W.2d at 214, 223.

At the direction of this Court, the Missouri Supreme Court has reconsidered this holding in several subsequent cases, including *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc

1980) (*Sours II*), and *State* v. *Haggard,* 619 S.W.2d 44 (Mo. banc 1981), but on each occasion has stubbornly adhered to the reasoning and result reached in its initial *Sours* opinion.

Actually, this prolonged litigation should never have been necessary. The precise issue presented by these cases was definitively resolved by this Court more than two months prior to *Sours I.* In *Brintley* v. *Michigan,* 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), this Court dismissed for want of a substantial federal question, the defendant's appeal from his multiple convictions for armed robbery under § 750.529, M.C.L.A., and a felony firearms violation under § 750.227(b), M.C.L.A., which were affirmed by a Michigan Supreme Court in the face of a double jeopardy claim identical to that made by the respondent in the instant case. *Wayne County Prosecutor* v. *Recorder's Court Judge,* 406 Mich. 374, 280 N.W.2d 793 (1979).

The defendant, like the respondent in the case at bar, had argued that his multiple convictions for armed robbery and a felony firearms violation contravened the Fifth Amendment's prohibition against multiple punishments for the same offense, a claim that was summarily rejected by this Court "for want of a substantial federal question." *Brintley* v. *Michigan, supra,* 444 U.S. at 948. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves undisturbed the original judgment appealed from. *Mandel* v. *Bradley,* 432 U.S. 173, 175, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). Although the Michigan statute (which is set out in Appendix C of the State's petition for writ of certiorari) differed slightly from Missouri's armed criminal action statute, (since it applies solely to the use of firearms and

not all dangerous or deadly weapons), the constitutional issue raised was identical, and therefore this Court's summary affirmance was binding upon the Missouri Supreme Court. *Hicks* v. *Miranda, supra,* 422 U.S. at 344-345. But even though the appeal in *Brintley* was rejected on November 13, 1979—more than two months prior to the Missouri Supreme Court's decision in *Sours I*—the Missouri Supreme Court has consistently ignored the existence of this decision.[4]

Thus, even though this Court had held by its summary affirmance in *Brintley,* that a conviction for both a felony firearm violation, such as Missouri's armed criminal action statute, § 571.015, and its predicate or underlying felony did not violate the Fifth Amendment's prohibition against multiple punishments for the same offense, the Missouri Supreme Court (and the Court of Appeals in this case) has consistently ruled to the contrary, just as if *Brintley* had never been decided.

In view of the Missouri Supreme Court's refusal to follow *Brintley,* the State successfully sought a writ of certiorari from this Court to review the decision in *Sours I,* and the decision of the Missouri Supreme Court vacating the armed criminal action conviction was set aside by this Court on May 27, 1980, for reconsideration in light of *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). See *Missouri* v. *Sours,* 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980). However, on remand, the Missouri Supreme Court reiterated its conclusion that

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[4]The Missouri Supreme Court has recognized that Michigan had reached a contrary result in ruling on the constitutionality of the multiple punishment provisions of its felony firearms statute in *Wayne County Prosecutor* v. *Recorder's Court Judge, supra,* but has chosen to ignore this Court's summary affirmance of that decision *sub nom. Brintley* v. *Michigan, supra.* See *Sours* v. *State, supra,* 593 S.W.2d at 217; *State* v. *Kane,* 629 S.W.2d 372, 376 (Mo. banc 1982).

cumulative punishments for both armed criminal action and the underlying felony constituted multiple punishment for the same offense. *Sours* v. *State*, *supra*, 603 S.W.2d at 605-606.[5]

As a result of *Sours II*, armed criminal action convictions were routinely reversed on double jeopardy grounds and, in most instances, the State sought review by certiorari from this Court. While those petitions were pending, this Court decided *Albernaz* v. *United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), and ultimately granted certiorari in all of Missouri's pending petitions, and vacated the decisions for re-examination in light of *Albernaz*.[6] But in response to these orders, the Missouri Supreme Court refused to change its position on the double-jeopardy issue. *State* v. *Haggard*, *supra*, 619 S.W.2d at 51. And, in *State* v. *Kane*, *supra*, the Missouri Supreme Court again reiterated its belief that the state legislature's "attempt to enhance or enlarge" a defendant's punishment under the armed criminal action statute was "violative of the constitutional prohibition against double jeopardy" because it is "phrased in terms of separate crime or offense". *Id.*, 629 S.W.2d at 377.

In a nutshell, it is the State's position that the decisions of the Missouri Supreme Court previously discussed, and the decision of the Missouri Court of Appeals in this case,

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[5]On January 26, 1981, the State's petition for a writ of certiorari to review the decision in *Sours II* was denied, *Missouri* v. *Sours*, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981), presumably because Sours had fully served both sentences by the time the petition was ruled on.

[6]*See Missouri* v. *Counselman*, 450 U.S. 990, 101 S.Ct. 1690, 68 L.Ed.2d 190, (1981); *Missouri* v. *Brown*, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); *Missouri* v. *Greer*, 451 U.S. 1013, 101 S.Ct. 3000, 69 L.Ed.2d 385 (1981); *Missouri* v. *Sinclair*, 452 U.S. 912, 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri* v. *Lowery*, 452 U.S. 912, 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri* v. *Crews*, 452 U.S. 957, 101 S.Ct. 3103, 69 L.Ed.2d 968 (1981).

are in conflict with and contrary to numerous decisions of this Court, including *Albernaz, Whalen* and *Brintley*. To be sure, the double jeopardy clause of the Fifth Amendment applies to the States through the Fourteenth Amendment and prohibits among other things, "multiple punishments for the same offense". But this protection, insofar as it is available to a defendant in a case involving a single prosecution for several statutory violations, committed in the same transaction, acts exclusively as a restraint on prosecutors and the courts and is designed to ensure that a defendant does not receive more punishment than the legislature intended to be imposed. In other words, the Fifth Amendment does not operate as a substantive limitation on the legislative power to define crimes and impose penalties for their violation. Although other provisions of the United States Constitution, such as the Eighth Amendment, restricts the legislative power in this area, the Fifth Amendment does not.

Consequently, the conclusion of the Missouri Court of Appeals, Western District, that multiple punishments for the offense of armed criminal action and the underlying felony (in this case, second-degree robbery), imposed at a single trial, violate the Fifth Amendment, notwithstanding the legislature's intent to punish for both offenses, is clearly erroneous and constitutes a fundamental misunderstanding of the Double Jeopardy Clause and its effect on single-prosecution cases.

In invalidating the respondent's conviction and 24-year sentence for armed criminal action on the ground that it constituted unconstitutional punishment, the Missouri Court of Appeals relied on previous decisions of the Missouri Supreme Court, all of which interpreted *Blockburger* v. *United States*, 284 U.S. 229, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), as a rule of substantive double jeop-

ardy law, rather than a rule of statutory construction. Missouri courts have concluded that, by definition, all of the elements of the underlying felony automatically become elements of armed criminal action, and thus the predicate felony will always constitute a "lesser-included offense" of armed criminal action. Applying *Blockburger* as a constitutional touchstone, the Missouri courts have concluded that, since the predicate felony will never include an element not necessarily incorporated in the offense of armed criminal action, the *Blockburger* rule prohibits, as a matter of constitutional law, convictions for both the greater offense (armed criminal action), and the lesser crime (the predicate felony).

But *Whalen* and *Albernaz* clearly demonstrate that this analysis of the Fifth Amendment is seriously flawed. *Whalen* held that *Blockburger* is not a rule of substantive constitutional law, but rather only "a rule of statutory construction", and that even if, upon application of the *Blockburger* test, two crimes are found to constitute the "same offense", cumulative sentences will not be prohibited if "elsewhere specifically authorized" by the legislature. *Id.*, 445 U.S. at 693.

This Court's ruling in *Albernaz* is even more explicit. In discussing the role and scope of the double jeopardy clause, insofar as it prohibits "multiple punishments for the same offense" imposed at a single trial, this Court unequivocally held:

(1) that "[t]he *Blockburger* test is a 'rule of statutory construction' ", which, "because it serves as a means of discerning congressional purpose", is not "controlling where, for example, there is a clear indication of contrary legislative intent." *Id.*, 450 U.S. at 340, 101 S.Ct. at 1143;

(2) that in considering the permissibility of multiple

punishments for offenses arising out of the same transaction, "the 'dispositive question' [i]s whether Congress intended to authorize separate punishments for the two crimes." *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145.

(3) that the " 'power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.' " *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145;

(4) that " 'where consecutive sentences are imposed at a single criminal trial," the role of the Fifth Amendment's prohibition against multiple punishments for the same offense, " 'is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense.' " *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145; and

(5) that, as a result, "the question of what punishments are constitutionally permissible is *not different from* the question of what punishment the Legislative Branch intended to be imposed" and where, as here, there exists a legislative intent "to impose multiple punishment, imposition of such sentences does not violate the Constitution." *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145. (emphasis added; footnote omitted.)

In the instant case, it is undisputed that the Missouri legislature intended that a defendant, who uses a dangerous or deadly weapon to commit a felony in the State of Missouri, should be sentenced and punished for both the felony he committed and the additional offense of armed criminal action. Since the legislature's intent in this respect is clear, there is no need to even resort to *Blockburger* or any other rule of statutory construction. As *Albernaz* expressly states, "the question of what punishments are constitutionally permissible is not different from the ques-

tion of what punishment the Legislative Branch intended to be imposed"; accordingly, the intent of the Missouri legislature in this case is dispositive of the respondents' double jeopardy claim and requires that the decision of the Missouri Court of Appeals, Western District, be vacated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, *Respondent,* v. WILLIAM McKINNEY, JR., *Appellant.*	**No. WD 31553** **Opinion filed** **March 23, 1982**

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

Honorable Louis Lombardo, Judge

Before Kennedy, P.J., Shangler and Wasserstrom, JJ.

Appellant was convicted upon jury trial of second-degree robbery, § 569.030, RSMo 1978, and armed criminal action, § 571.015, RSMo 1978, in the March 8, 1979, robbery of Pamela Copeland, which yielded $1,142 money belonging to the Granada Inn. He was sentenced to 11 years' imprisonment on the robbery charge and 24 years' imprisonment on the armed criminal action charge, to be served concurrently.

He appeals with two complaints about his trial. He claims the court erred in admitting testimony of out-of-court identification because of impermissibly suggestive police procedures, and in allowing in-court identification by witnesses Copeland, Goss and Cayer. Second, he complains of his armed criminal action conviction as being in violation

of his constitutional rights against double jeopardy. criminal action conviction.

We affirm the robbery conviction and reverse the armed criminal action conviction.

The facts briefly stated are as follows:

Two black men on March 8, 1979, according to the state's evidence, approached the reservation desk of the Granada Inn. One of them (later identified as the defendant) inquired about a room, the second one standing a few feet to the rear. Pamela Copeland, the desk clerk, and Chris Goss, the bellman, were behind the desk. As Pamela was asking defendant how many nights he intended to stay, he produced a handgun and ordered her to give him all her money. She gave him the tray containing the hotel money, which she estimated to be about $1,200. The second man, who then came behind the reservation desk, took the change which was not in the tray.

Witness Cayer, a guest at the hotel, was seated in the lobby. He had noticed the two men in the lobby for some minutes before the robbery "kind of lingering around the stamp machine and a shoeshine machine, put a quarter in there, just kind of looking around, just kind of standing there." The robbers forced him to come to the reception desk. He, along with the two hotel employees, were made to lie down behind the desk. The robbers made their escape.

The police arrived and interviewed the three.

Two days later the police exhibited an array of photographs of individuals to Pamela, Goss and Cayer, the three witnesses. Defendant's picture was identified as that of one of the robbers. Three days later the witnesses separately picked out defendant from a lineup at the police station.

1. *Pre-trial and in-court identification testimony.*

Appellant's first point—that the court erred in allowing testimony of out-of court and in-court identification of defendant—may be quickly disposed of. The testimony was given with no objection at trial. Its admission is not assigned as error in the motion for new trial. Rule 29.11(d). It is thus not preserved for review. State v. Smith, 609 S.W.2d 478, 480 (Mo. App. 1980); State v. Timmons, 584 S.W.2d 129, 133 (Mo. App. 1979).

We have nonetheless, with appellant's criticisms before us, examined the record in search of plain error, Rule 29.12(b), in the admission of the identification evidence. The identification procedures used by the police were not impermissibly suggestive, State v. Sanders, 621 S.W.2d 386, 388-389 (Mo. App. 1981); State v. Bivens, 558 S.W.2d 296, 299 [5] (Mo. App. 1977), and the in-court identification was entirely proper. Neil v. Biggers, 409 U.S. 188, 199 (1972); State v. Higgins, 592 S.W.2d 151, 160 (Mo. banc 1979), appeal dismissed, 446 U.S. 902 (1980). The defendant closely cross-examined the witnesses about identification procedures to bring out any uncertainty in the witnesses' identification, so that the jury was equipped to evaluate their reliability. See State v. Brunson, 555 S.W.2d 359, 361-362 [5] (Mo. App. 1977).

The identification testimony was proper, and would correctly have been admitted even over defendant's objection. The point is disallowed.

2. *Armed criminal action, double jeopardy.*

Defendant's next point is that his conviction for armed criminal action is invalid as in violation of his rights against double jeopardy. This point must be sustained.

Where a defendant is convicted of second-degree robbery, his conviction for armed criminal action, growing out

of the same incident, constitutes a violation of his constitutional right against double jeopardy. In such a case the armed criminal action conviction must be set aside. State v. Kane, No. WD 31611 (Mo. App. August 6, 1981), State v. Kane, No. 63324 (Mo. banc March 9, 1982); State v. Thompson, No. WD 31513 (March 30, 1981); State v. Thompson, No. 63325 (Mo. banc March 9, 1982).

Defendant's conviction for second-degree robbery is affirmed. His conviction for armed criminal action is reversed.

All concur.

Don W. Kennedy, Presiding Judge

APPENDIX B

Section 556.041, RSMo 1978, reads as follows:

"556.041. Limitation on conviction for multiple offenses.—When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if

(1) One offense is included in the other, as defined in section 556.046; or

(2) Inconsistent findings of fact are required to establish the commission of the offenses; or

(3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(4) The offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses."

Section 556.046, RSMo 1978, reads as follows:

"556.046. Conviction of included offenses.—1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when

(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(2) It is specifically denominated by statute as a lesser degree of the offense charged; or

(3) It consists of an attempt to commit the offense

charged or to commit an offense otherwise included therein.

2. The court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

Section 569.030, RSMo 1978, reads as follows:

"**569.030. Robbery in the second degree.**—1. A person commits the crime of robbery in the second degree when he forcibly steals property.

2. Robbery in the second degree is a class B felony."

Section 571.015, RSMo 1978 (effective Jan. 1, 1979), reads as follows:

"**571.015. Armed criminal action, defined, penalty.**—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee by, with, or through the use, assistance, or aid of dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo."

Section 571.017, RSMo Supp. 1982 (effective August 13, 1982), reads as follows:

"571.017. Nothing contained in any other provision of law, except as provided in subsection 4 of section 571.015, shall prevent imposition of sentences for both armed criminal action and the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon."

Section 559.225, RSMo Supp. 1976 (repealed, Jan. 1, 1979), reads as follows:

"559.225. **Armed criminal action—penalty—exceptions.**—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed

pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo."

APPENDIX C

Section 750.227(b), M.C.L.A., reads as follows:

"Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976, No. 6, § 1, Eff. Jan. 1, 1977." [footnote omitted.]

Section 750.529, M.C.L.A., reads as follows:

"750.529. Armed robbery; aggravated assault—Any person who shall assault another, and shall feloni-

ously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960."

No. 82-272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

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SUPREME COURT, U.S.

STATE OF MISSOURI,

Petitioner,

vs.

WILLIAM McKINNEY, JR.,

Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

RESPONDENT'S BRIEF IN OPPOSITION

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2. If this Court cannot determine whether the decision below rests upon a federal constitutional or an adequate and independent state statutory ground, then counsel requests that it vacate the judgment below and remand the case to the Missouri Court of Appeals, Western District, to consider whether its judgment rests upon the federal constitution, state statutes, or both grounds 6

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No. 81-272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF MISSOURI,

Petitioner,

vs.

WILLIAM J. McKINNEY, JR.,

Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent WILLIAM McKINNEY, JR. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Missouri Court of Appeals, Western District, opinion in this case.

REASONS FOR DENYING THE WRIT

1. The decision below rests solely or in addition to the federal constitutional ground upon an adequate and independent state statutory ground, i.e. that §§556.041(1) and 556.046.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action.

Petitioner asserts that the decision below -- State v. McKinney, 633 S.W.2d 168 (Mo. App. 1982) -- reversing respondent's conviction for armed criminal action, §571.015, RSMo 1978, rests solely upon an erroneously decided federal constitutional ground. Petitioner asserts that the decisions below were decided under the authority of State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), Sours v. State (Sours II), 603 S.W.2d 592 (Mo. banc 1980) and Sours v. State (Sours I), 593 S.W.2d 208 (Mo. banc 1980), holding the multiple punishment provision of Missouri's virtually identical predecessor armed criminal action statute, §559.225, RSMo Supp. 1976, violative of the multiple

punishment for the same offense protection of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Those decisions are presently being reviewed upon the merits by this Court in Missouri v. Hunter, No. 81-1214 (U.S. April 5, 1982), granting Missouri's petition for certiorari in State v. Hunter, 622 S.W.2d 374 (Mo. App. 1982).

Assuming, but not conceding, for the sake of argument that the multiple punishment provision of Missouri's armed criminal action statute is constitutional and Haggard, Sours I and Sours II are erroneously decided, the decision below, reversing respondent's conviction for armed criminal action, rests upon a state ground, sufficiently adequate and independent of the federal constitutional ground to prevent this Court from acquiring jurisdiction under 28 U.S.C. §1257 to review the decision below. This assumption solely for the sake of argument is a device to clarify the dispositive issue in this case, and is not, as Missouri characterizes it, "nothing more than an acknowledgment that his [respondent's] position on the constitutional issue ... is utterly hopeless." Petition for Certiorari, 9. There has been filed in Missouri v. Hunter, No. 82-1214, a brief on the merits supporting the Missouri Supreme Court's reversal of armed criminal action convictions upon double jeopardy grounds.

The adequate and independent state ground upon which the decision below rests is that §§556.041(1) and 556.046.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by the same or less than all the facts required to prove armed criminal action. See, State ex rel Westfall v. Ruddy, 621 S.W.2d 42, 43-45 (Mo. banc 1981). Sections 556.041 and 556.046, RSMo 1978, did not exist prior to January 1, 1979 (S.B. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, pp. 665, 718) and thus were not available as a ground for reversing convictions for armed criminal action offenses committed prior to that date. Therefore, the Missouri Supreme Court's reversals of the armed criminal action convictions in Haggard, Sours I and Sours II rest only upon a federal constitutional ground, and the

Missouri Court of Appeals, Western District, reversal in respondent's case and the Missouri Supreme Court's reversal of the respondents' conviction for armed criminal action in Missouri v. Kane, No. 82-2117 (petition for certiorari filed May 7, 1982), rests solely or also upon an adequate and independent state ground.

Missouri has characterized this argument as a lie, to put it in plain words, by claiming "counsel [the undersigned writer] for the respondents in Missouri v. Kane, No. 81-2117 ... rather disingenuously argued," Petition for Certiorari, 5, the existence of an adequate and independed state ground as a basis for denying certiorari therein. This argument is not a lie, fabricate by counsel. Though the court below expressed a federal constitutional reason for reversal of the armed criminal action conviction, the state statutory basis for the court's decision can be understood from its citations, McKinney, supra, 633 S.W.2d at 165-166, to State v. Kane, 629 S.W.2d 370 (Mo. App. 1981), State v. Kane, 629 S.W.2d 372 (Mo. App. 1982), State v. Thompson, 629 S.W.2d 361 (Mo. App. 1981) and State v. Thompson, 629 S.W.2d 369 (Mo. banc 1982) and an analysis of State v. Arnold, 628 S.W.2d 665 (Mo. 1982).

The reason expressed by the Missouri Court of Appeals in its opinion filed August 6, 1981 for reversing one of the two convictions in Kane was:

> The determination of defendant's first two points is therefore controlled by State ex rel. Westfall v. Ruddy, 621 S.W.2d 42 decided by the Missouri Supreme Court en banc July 23, 1981.

State v. Kane, 629 S.W.2d 370, 371 (Mo. App. 1981) (emphasis added). No federal constitutional reason was given. If Kane was decided upon a constitutional ground, then Sours I and Sours II (Haggard had not yet been decided) would have been cited. They were not. The court below also did not cite Sours I and Sours II. The reason expressed by the Missouri Court of Appeals in its opinion filed March 30, 1981 (prior to the Ruddy decision date) for reversing one of the two convictions in Thompson was a federal constitutional one. State v. Thompson, 629 S.W.2d 361, 369 (Mo. App. 1981). The state statutory ground was not discussed. The court changed its federal constitutional reason to a state statutory one, however, when it transferred the case to the Missouri Supreme Court on

August 18, 1982 (subsequent to the Ruddy and Kane decision dates) "for the reason set forth in the opinion filed in State v. Anthony Kane, WD 31611 (opinion filed August 6, 1981)." Missouri v. Kane, No. 81-2117, Brief in Opposition, A1. The reason the court transferred Kane was for the Missouri Supreme Court to decide whether the armed criminal action or the underlying felony conviction should be reversed. Kane, supra, 629 S.W.2d at 371-372.[1]

The reason expressed by the Missouri Court of Appeals in its opinion filed March 30, 1981 (the same date as its decision in Thompson and prior to the decision date of Ruddy) for reversing one of the two convictions in Arnold was a federal constitutional one. Missouri v. Kane, No. 81-2117, Petition for Certiorari, A71. The state statutory ground was characterized as "totally without merit." Missouri v. Kane, No. 82-2117, Petition for Certiorari, A70. The case was transferred that day to the Missouri Supreme Court, Missouri v. Kane, No. 81-2117. Brief in Opposition, A2, for it to determine whether an argument by the prosecuting attorney was a comment upon the defendant's right not to testify. Missouri v. Kane, No. 81-2117, Petition for Certiorari, A65, A71, A76-79. Thus the Missouri Court of Appeals did not have an opportunity to consider Arnold in the light of Ruddy, and the Missouri Supreme Court had no reason to consider Arnold in the light of Ruddy, since the case was transferred to it for another reason. And, it must be noted, three of the five Missouri Supreme Court justices who joined in the opinion in Arnold (the remaining two were special justices) joined in the opinion in Ruddy. Arnold, supra, 628 S.W.2d at 666, 671; State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 45.

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[1]While realizing that it could elect either the remedy of reversing the underlying felony conviction or remanding the case for a new trial so that the jury could chose for which offense it would convict and assess punishment, the Missouri Supreme Court elected the remedy of reversing the armed criminal action conviction. The court interpreted juries' assessment of the greater punishment upon the underlying felony rather than upon the armed criminal action "in excess of ninety-five percent of the cases" to mean that juries believed they were enhancing the greater sentence for the underlying felony. Kane, supra, 629 S.W.2d at 373, 377.

The Missouri Court of Appeals in respondent Kane's case accepted the state statutory ground, because it cited Ruddy and not Sours I or Sours II (Haggard had not yet been decided) as the cases controlling both of respondent Kane's arguments (statutory and federal constitutional) for reversing one of his convictions. Kane, supra, 629 S.W.2d at 371. The Missouri Court of Appeals in respondent Thompson's case made no reference to the state statutory ground, but changed its federal constitutional reason to a state statutory one when it transferred the case to the Missouri Supreme Court for the same reason Kane was transferred. Missouri v. Kane, No. 81-2117, Brief in Opposition, A1. The Missouri Court of Appeals in respondent Arnold's case rejected the state statutory ground as "totally without merit," because it was controlled by Sours I and Sours II (Haggard, had not yet been decided). Missouri v. Kane, No. 81-2117, Petition for Certiorari, A70-71. It was this holding upon the state statutory ground in the intermediate state appellate court's opinion in respondent Arnold's case that the Missouri Supreme Court specifically disapproved in Ruddy.

> In State v. Upshaw (Mo. App. 1981) [W.D. No. 31443], and State v. Arnold, a case transferred after opinion by the Missouri Court of Appeals, Western District, now pending in this Court as No. 62999, the court of appeals rejected an argument that, under §§556.041(1) and 556.046.1(1), an accused could not be prosecuted and convicted of the underlying felony and armed criminal action. That holding was not necessary to the result, because the Court of Appeals, in both instances, vacated the armed criminal action conviction and sentence under Sours I and II anyway.

State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 45.

This Court "will not review judgments of state courts that rest upon adequate and independent state grounds. ... [Its] only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. ... We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

In summary, then, the petition for a writ of certiorari should be denied, because the decision below rests upon an adequate and independent state statutory ground, i.e. that §§556.041(1) an §556.046.1(1), RSMo 1978, prohibit conviction for both armed criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action. See, State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 43-45. That the decision below is based upon this state statutory ground is evidenced by the court below citing to the the two Kane and the two Thompson decisions, rather than Sours I and Sours II. Secondly, it is evidenced by the intermediate state appellate court holding in Kane that Ruddy rather than Sours I and Sours II controlled both the state statutory and the federal constitutional grounds, and the Missouri Supreme Court's approval of that result. Thirdly, it is evidenced by the intermediate state appellate court in Thompson making a federal constitutional holding and subsequently after Ruddy and Kane were decided changing its holding to a state statutory one by transferring the case to the Missouri Supreme Court for the same reason it transferred Kane, and the highest state court approving, as it did in Kane, of the result. Finally, it is evidenced by the intermediate state appellate court making a federal constitutional holding in Arnold and rejecting the state statutory ground, and the Missouri Supreme Court subsequently specifically disapproving of the intermediate court rejection of the state statutory ground.

2. If this Court cannot determine whether the decision below rests upon a federal constitutional or on adequate and independent state statutory ground, then counsel requests that it vacate the judgments below and remand the cases to the Missouri Court of Appeals, Western District, to consider whether its judgment rests upon the federal constitution, state statutes, or both grounds.

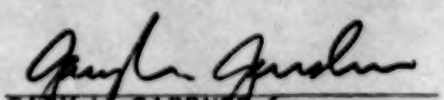
Petitioner assets that the decision below, reversing respondent's conviction for armed criminal action, §571.015, RSMo 1978, rests

solely upon an erroneous interpretation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution -- a federal constitutional ground. Respondent asserts that the decision below rests solely or in addition to the federal constitutional ground upon an adequate and independent state statutory ground, i.e. that §§556.041(1) and 556.041.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action. See, State ex rel. Westfall v. Ruddy, 621 S.W.2d 42, 43-45 (Mo. banc 1981). If this Court cannot determine whether the decision below rests upon a federal constitutional or an adequate and independent state statutory ground, then counsel requests that this Court vacate the judgments below and remand the case to the Missouri Court of Appeals, Western District, to consider whether its judgment rests upon the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, or §§556.041(1) and 556.046.1(1), RSMo 1978, or upon both grounds. California v. Krivda, 409 U.S. 33, 35, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972); Illinois v. Vitale, 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645 (1978).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied or in the alternative the judgment below should be vacated and the case remanded to the Missouri Court of Appeals, Western District, to consider whether its judgment rests upon the federal constitution, state statutes, or both grounds.

Respectfully submitted,



GARY L. GARDNER for
William McKinney, Jr.

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Attorneys for Respondent

No. 82-272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RECEIVED
SEP 4 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF MISSOURI,

Petitioner,

vs.

WILLIAM McKINNEY, JR.

Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

CERTIFICATE OF SERVICE

I, GARY L. GARDNER, a member of the Bar of this Court and counsel of record for respondent William McKinney, Jr., hereby certify, pursuant to Rule 28, that on the 1st day of September, 1982, I served one copy of respondent's Motion for Leave to Proceed in Forma Pauperis and Respondent's Brief in Opposition on the State of Missouri, petitioner herein, by depositing such copies in a United States mailbox, first-class postage prepaid, addressed to Philip M. Koppe, Assistant Attorney General, 615 East 13th Street, Room G-20, Kansas City, Missouri 64106.

All parties required to be served have been served.

Dated September 1, 1982.

Respectfully submitted,

GARY L. GARDNER for
William McKinney, Jr.

JAMES W. FLETCHER
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GARY L. GARDNER
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Attorneys for Respondent

Office - Supreme Court, U.S.
FILED
SEP 4 1982
ALEXANDER L. STEVAS

No. 82-272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF MISSOURI,

Petitioner,

vs.

WILLIAM McKINNEY, JR.,

Respondent

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now WILLIAM McKINNEY, JR., respondent herein, by and through his court appointed attorney, and moves this Honorable Court for leave to file his Brief in Opposition without prepayment of costs, if any, and to proceed in forma pauperis herein pursuant to Rule 46. Respondent sought from the Circuit Court of Jackson County, Missouri, the trial court below, leave to perfect his appeal to the Missouri Court of Appeals, Western District, in forma pauperis, and such leave was granted.

Respectfully submitted,

GARY L. GARDNER for
William McKinney, Jr.

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Public Defender

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Attorneys for Respondent

No. 82-272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF MISSOURI,

Petitioner,

vs.

WILLIAM McKINNEY, JR.,

Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, WILLIAM McKINNEY, JR., being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instruction below relating to my ability to pay the costs of responding to the petition are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Answer:

No

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Answer:

No

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

Answer:

No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. If the answer is yes, describe the property and state its approximate value.

Answer:

No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer:

No

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William McKinney, Jr.
WILLIAM McKINNEY, JR.

SUBSCRIBED AND SWORN TO before me this ___ day of SEP 1 1982 1982.

Oscar D. Dunbar
Notary Public

OSCAR D. DUNBAR
Notary Public, State of Missouri
My Commission Expires August 1, 1984

No. 82-272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF MISSOURI,

Petitioner,

vs.

WILLIAM McKINNEY, JR.

Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

CERTIFICATE OF SERVICE

I, GARY L. GARDNER, a member of the Bar of this Court and counsel of record for respondent William McKinney, Jr., hereby certify, pursuant to Rule 28, that on the 9th day of September 1982, I served one copy of respondent's Affidavit in Support of Motion to Proceed in Forma Pauperis on the State of Missouri, petitioner herein, by depositing such copies in a United States Mailbox, first-class postage prepaid, addressed to Philip M. Koppe, Assistant Attorney General, 615 East 13th Street, Room G-20, Kansas City, Missouri 64106.

All parties required to be served have been served.

Dated September 9, 1982.

Respectfully submitted,

Gary L. Gardner

GARY L. GARDNER for
William McKinney, Jr.

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